

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

**JEREMY PRATER and ANTOINETTE
BAKER,**

Plaintiffs,

v.

**HERSCHEND FAMILY ENTERTAINMENT
CORPORATION, NEW JERSEY STATE
AQUARIUM and JOHN DOE ONE THROUGH
FIVE (Fictitious Entities)**

Defendants.

CIVIL ACTION

NO.

**PETITION OF DEFENDANTS, HERSCEND FAMILY ENTERTAINMENT
CORPORATION AND NEW JERSEY AQUARIUM, LLC, FOR REMOVAL**

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY:

AND NOW come defendants, Herschend Family Entertainment Corporation and New Jersey Aquarium, LLC¹ (hereinafter referred to as "Petitioners"), for the purpose of removing this Civil Action to the District Court of the United States for the District of New Jersey, and in support thereof state as follows:

1. On or about July 1, 2014, plaintiffs commenced this action in the Superior Court of New Jersey, Law Division, Camden County, at Docket Number CAM-L-2618-14 (hereinafter

¹\ Plaintiffs commenced suit against "New Jersey State Aquarium, LLC" but no such legal entity exists. The correct name of the entity that operates the Adventure Aquarium, where plaintiff was allegedly injured, is "New Jersey Aquarium, LLC".

“the State Court Action”). *See* true and correct copy of plaintiffs’ Complaint, attached hereto as Exhibit "A".

2. Plaintiffs’ Complaint was served on Petitioner New Jersey Aquarium, LLC on July 9, 2014.

3. At the time of the commencement of the State Court Action and at the time of removal, plaintiffs are residents and citizens of the Commonwealth of Pennsylvania. *See* Exhibit “A”.

4. At the time of the commencement of the State Court Action and at the time of removal, Petitioner Herschend Family Entertainment Corporation is a Missouri corporation with a principal place of business in Branson, Missouri, *see* true and correct copy of Affidavit of Stephen L. Earnest, attached hereto as Exhibit “B”, ¶3, and, as such, is a citizen of the State of Missouri.

5. At the time of the commencement of the State Court Action and at the time of removal, Petitioner New Jersey Aquarium, LLC is a limited liability company, *see* Exhibit “B” ¶2, and as such has the citizenship of its Members. *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 419-20 (3d Cir. 2010).

6. At the time of the commencement of the State Court Action and at the time of removal, New Jersey Aquarium, LLC is a wholly-owned subsidiary of Herschend Entertainment Company, LLC, a Missouri limited liability company. *See* Exhibit “B” ¶2.

7. At the time of the commencement of the State Court Action and at the time of removal, Herschend Entertainment Company, LLC, a Missouri limited liability company, is a wholly owned subsidiary of Herschend Family Entertainment Corporation which, as stated above, is a Missouri corporation with a principal place of business in Branson, Missouri. *See* Exhibit “B” ¶¶2-3.

8. Because this matter involves a controversy between citizens of different states and the amount in controversy exceeds the sum of \$75,000.00, exclusive of interest and costs, this matter is removable under 28 U.S.C. § 1332.

9. This Notice of Removal is timely under 28 U.S.C. § 1446(b) because it is being filed within thirty (30) days after service of the complaint upon Petitioner, New Jersey Aquarium, LLC, which was on July 9, 2014.

10. No further proceedings as to Petitioners have taken place with regard to this action in the State Court Action filed in the Superior Court of New Jersey, Camden County.

11. The above-described action is a Civil Action over which this Court has original jurisdiction pursuant to 28 U.S.C. §1332 and is one which may be removed to this Court by the Petitioners, pursuant to the provisions of 28 U.S.C. §1441.

12. This suit involves a controversy between citizens of different states: The plaintiffs, according to their Complaint, are residents and citizens of the Commonwealth of Pennsylvania. Neither of the Petitioners is a resident or citizen of the Commonwealth of Pennsylvania.

13. The amount in controversy would logically appear to exceed seventy-five thousand dollars (\$75,000.00) exclusive of interest and costs as this case allegedly involves a torn tendon in plaintiff's ankle, lumbar and thoracic spine injuries, tendinosis of plaintiff's shoulder, and over \$33,000 in medical specials. *See* correspondence from plaintiffs' counsel to TPA claims adjuster, Bill Toll, attached hereto as Exhibit "C". Absent an admission by the plaintiffs that the potential value of their claims does not exceed \$75,000, jurisdiction of this Court is established.

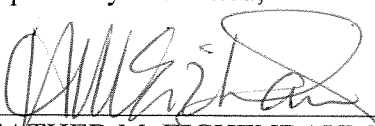
14. Petitioners have simultaneously with the filing of this Notice given written notice to counsel for all other parties involved in this action.

15. Petitioners have filed a copy of the instant Notice of Removal with all attachments thereto with the Clerk of the Superior Court of New Jersey, Law Division, Camden County.

WHEREFORE, Herschend Family Entertainment Corporation and New Jersey Aquarium, LLC, respectfully request that this suit be removed to this Honorable Court pursuant to the laws of the United States.

Respectfully submitted,

By:


HEATHER M. EICHENBAUM, ESQUIRE
Attorney for Defendants,
Herschend Family Entertainment Corp.
and New Jersey Aquarium, LLC

Spector Gadon & Rosen, P.C.
Seven Penn Center
1635 Market Street, 7th Floor
Philadelphia, PA 19103
(215) 241-8856
(215) 531-9129 [fax]
heichenbaum@lawsgr.com

Dated: July 16, 2014

EXHIBIT “A”

LAW OFFICES OF PAUL H. KAHN, P.C.
BY: PAUL H. KAHN, ESQUIRE
121 South Broad Street, 18th Floor
Philadelphia, PA 19107
(215) 546-2286

2014 JUN 30 PM 1:05
ATTORNEY FOR PLAINTIFFS

JEREMY PRATER and ANTOINETTE BAKER
Plaintiffs

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : CAMDEN COUNTY

vs.

DOCKET NO.:

HERSCHEND FAMILY ENTERTAINMENT
CORPORATION, NEW JERSEY STATE
AQUARIUM and JOHN DOE ONE THROUGH
FIVE (Fictitious Entities)
Defendants

COMPLAINT AND JURY DEMAND

Plaintiffs residing at 4611 Paul Street, Philadelphia, PA, complaining of Defendants, say:

FIRST COUNT

1. On or about July 9, 2012, the Defendants, Herschend Family Entertainment Corporation, New Jersey State Aquarium and/or John Doe One through Five (Fictitious Entities) were the owners and/or were in control of the premises commonly known as the New Jersey State Aquarium in Camden, New Jersey, and in particular, the exterior walkway areas near the aquatic mammal exhibits.

2. Defendants John Doe One through Five (Fictitious Entities) represent one or more individuals, corporations, companies or business entities responsible for the creation, care, maintenance and repair of the aforesaid exterior walkway.

3. At said time and place, the Plaintiff, Jeremy Prater, was lawfully a business invitee on said premises.

4. Due to the negligence and carelessness of the Defendants in the creation, care, maintenance and control of said premises, Plaintiff Jeremy Prater was caused to fall.

5. As a result, Plaintiff Jeremy Prater sustained severe personal injuries causing great anguish and pain, requiring medical care and treatment, causing him to lose time from his usual duties and causing him to lose other divers losses in monies.

WHEREFORE, Plaintiff Jeremy Prater demands judgment against the Defendants jointly, severally or in the alternative for damages and costs.

SECOND COUNT

1. Plaintiff Jeremy Prater repeats each and every allegation contained in the First Count as if same were set forth herein at length and makes them a part hereof.
2. The Defendants did warrant that said premises were safe and fit for the purposes for which they were intended.
3. The Defendants breached their warranty as neither the premises nor the above described walkway areas were fit for the purposes for which they were to be used, and as a consequence, Plaintiff Jeremy Prater was caused to sustain severe personal injuries.

WHEREFORE, Plaintiff Jeremy Prater demands judgment against the Defendants jointly, severally or in the alternative for damages and costs.

THIRD COUNT

1. Plaintiff Antoinette Baker repeats each and every allegation contained in the First Count and Second Count as if same were set forth herein at length and in addition alleges that she is the wife of Plaintiff Jeremy Prater.
2. As a result of the injuries sustained by her husband, this Plaintiff did sustain a loss of services and consortium.

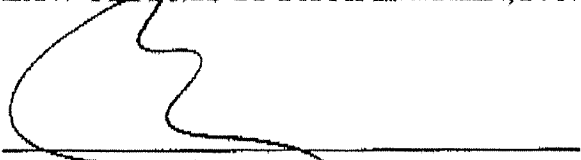
WHEREFORE, Plaintiff Antoinette Baker demands judgment against the Defendants jointly, severally or in the alternative for damages and costs.

JURY DEMAND

Plaintiffs hereby demand Trial by Jury as to all issues involved herein.

LAW OFFICES OF PAUL H. KAHN, P.C.

BY:


PAUL H. KAHN, ESQUIRE
Attorney for PLAINTIFFS


CERTIFICATION

I hereby certify that the matter in controversy is not the subject of any other action pending in any Court or of a pending arbitration proceeding.

I further certify that I am aware of no other party who should be joined in this action.

LAW OFFICES OF PAUL H. KAHN, P.C.

BY:



PAUL H. KAHN, ESQUIRE
Attorney for PLAINTIFFS

EXHIBIT “B”

STATE OF GEORGIA :
 : SS
COUNTY OF GWINNETT :

I, STEPHEN L. EARNEST, being of full age and sound mind, hereby depose and upon my oath aver as follows:

1. I am the Senior Vice President, General Counsel, and Secretary of both Herschend Family Entertainment Corporation and Herschend Entertainment Company, LLC, and am personally knowledgeable regarding the averments in this Affidavit.

2. New Jersey Aquarium, LLC is an Ohio Limited Liability Company with one Member, that being Herschend Entertainment Company, LLC ("HEC"), a Missouri Limited Liability Company. *See* true and correct copies of pertinent portions of Amended and Restated Operating Agreement of New Jersey Aquarium, LLC and Assignment of Limited Liability Company Interest, attached hereto as Exhibit "1".

3. HEC has one Member, that being Herschend Family Entertainment Corporation ("HFEC"), a Missouri corporation, with its principal place of business at 2800 West Highway 76, Branson, Missouri. *See* true and correct copy of pertinent portions of Operating Agreement of Herschend Entertainment Company, LLC, attached hereto as Exhibit "2".

4. HFEC was founded in Missouri and it continues to conduct all significant corporate functions there.

5. HFEC also opened a headquarters in Norcross, Georgia, in 2004, and it is the only other location at which HFEC and/or HEC conduct any significant corporate business.

6. Neither HEC nor HFEC maintain a principal place of business in New Jersey.

7. In fact, neither HEC nor HFEC has a place of business in New Jersey.

8. HEC and HFEC maintain their corporate offices in Branson, Missouri and Norcross, Georgia, where they conduct business on a day-to-day basis involving both administrative staff and officers.

9. HEC and HFEC's officers (including both high level and lower level) primarily direct, control, and coordinate the entities' activities, including the vast majority of their day-to-day as well as more significant activities, from their corporate offices in Branson, Missouri and Norcross, Georgia.

10. In fact, neither HEC nor HFEC conduct any of their corporate activities in the State of New Jersey.

I swear the above is true and correct to the best of my knowledge, understanding, and belief.


STEPHEN L. EARNEST

SWORN BEFORE ME THIS
14th DAY OF July 2014


NOTARY PUBLIC

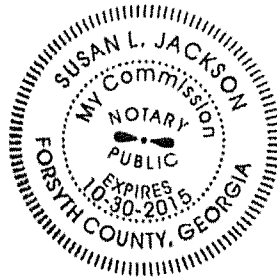


EXHIBIT “1”

AMENDED AND RESTATED OPERATING AGREEMENT OF
NEW JERSEY AQUARIUM, LLC

THIS AMENDED AND RESTATED OPERATING AGREEMENT, made and entered into as of the 31st day of December, 2007, by **HERSCHEND FAMILY ENTERTAINMENT CORPORATION** (hereinafter sometimes referred to as "HFEC").

W I T N E S S E T H:

WHEREAS, as of the date hereof, HFEC has acquired all of the outstanding membership interest in New Jersey Aquarium, LLC, an Ohio limited liability company (the "Company"); and

WHEREAS, in connection with the acquisition of the membership interest in the Company, HFEC desires to amend and restate the operating agreement of the Company;

NOW, THEREFORE, in consideration of the premises, HFEC hereby declares the following:

ARTICLE I
CONTINUATION

The Member hereby agrees to continue to operate a limited liability company pursuant to the Ohio Limited Liability Company Act (the "Act"), as amended from time to time, to be managed by the Member with the advice and consent of the Board of Advisors. Unless the Act expressly provides that the Act supersedes any provision contained in this Agreement, the terms and conditions of this Agreement shall apply. The member hereby ratifies the Articles of Organization (the "Articles") filed in the Office of the Secretary of State for the State of Ohio with respect to the Company, additionally the Member ratifies the Company's authorization to conduct business as a foreign limited liability company in the State of New Jersey. Member's interest in the Company shall be personal property for all purposes. All real or personal property owned by the Company shall be owned by the Company as an entity, and no Member individually shall have any ownership interest in the property. All references to the "Code" refer to the Internal Revenue Code of 1986, as amended.

ARTICLE II
NAME

The name of the Company is **New Jersey Aquarium, LLC**. The business and affairs of the Company shall be conducted solely under that name, or under any fictitious names as may be filed by the President of the Company, with the approval of the Board of Advisors.

**ARTICLE IV
PRINCIPAL OFFICE**

The principal office of the Company shall be 2800 West Highway 76, Branson, Missouri 65616, or another place or places as may hereafter be approved by the Board of Advisors. The registered office of the Company, and the registered agent at the registered office, shall be CT Corporation System 1300 East 9th Street Cleveland, Ohio 44114.

12.3 Further Action. The Members shall execute and deliver all documents, provide all information and take or refrain from taking action as may be necessary or appropriate to achieve the purposes of this Operating Agreement.

12.4 Counterparts. This Operating Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

12.6 Gender and Number. Whenever the context of this Operating Agreement requires, the masculine gender includes the feminine and neuter genders, and vice versa, and the singular number includes the plural, and vice versa.

12.7 Headings. The headings used in this Operating Agreement are for convenience only and shall not be construed in interpreting this Operating Agreement.


12.8 Entire Agreement. This Operating Agreement contains the entire agreement among the Members with respect to the matters of this Operating Agreement and shall supersede and govern all prior agreements, written or oral.

12.9 Severability. All provisions of this Operating Agreement shall be severable. Any provision that, for any reason, is determined to be invalid shall not affect the validity of any other provision of this Operating Agreement.

12.10 Amendments. This Operating Agreement may not be altered, amended or modified except pursuant to a written instrument executed by all Members.

IN WITNESS WHEREOF, HFEC has executed this Operating Agreement as of the day and year first above written.

**HERSCHEND FAMILY ENTERTAINMENT
CORPORATION**

By: 
Name: Kenneth F. Herschend
Title: SR. VP of Finance & CFO Assistant Controller

ASSIGNMENT OF LIMITED LIABILITY COMPANY INTEREST

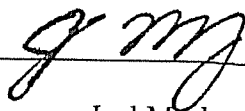
THIS ASSIGNMENT OF LIMITED LIABILITY COMPANY INTEREST is delivered by Herschend Family Entertainment Corporation ("Assignor") to Herschend Entertainment Company, LLC ("Assignee") effective as of December 30, 2013 for the assignment of Assignor's membership interest in the limited liability companies set forth in the attached Exhibit "A" (the "Companies").

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor hereby assigns, grants, transfers and delivers all of its right, title and interest in its membership interest in the Companies (the "Assignor's Membership Interests") to Assignee. Assignor hereby represents, covenants and warrants that Assignor (a) has good title to the Assignor's Membership Interests, free of all liens and encumbrances, and (b) has the right to assign and transfer the Assignor's Membership Interests as allowed in the respective Companies' operating agreements.

Assignee hereby adopts and agrees to be bound by the respective Companies' operating agreement as though it was an original party thereto.

This assignment shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns.

HERSCEND FAMILY ENTERTAINMENT CORPORATION

By: 

Name: Joel Manby

Title: President & CEO

HERSCEND ENTERTAINMENT COMPANY, LLC

BY: 

Name: Joel Manby

Title: President & CEO

EXHIBIT "A"

LIST OF COMPANIES MEMBERSHIP INTEREST ASSIGNED FROM HFEC TO HEC

<u>COMPANY NAME</u>	<u>OWNERSHIP %</u>
NEW JERSEY AQUARIUM, LLC	100%

EXHIBIT “2”

**OPERATING AGREEMENT OF
HERSCHEND ENTERTAINMENT COMPANY, LLC**

THIS OPERATING AGREEMENT is made and entered into the 29 day of July, 2013, by HERSCHEND FAMILY ENTERTAINMENT CORPORATION (hereinafter sometimes referred to as "HFEC").

WITNESSETH:

WHEREAS, HFEC desires to form a limited liability company (the "Company") under The Missouri Limited Liability Company Act (the "Act"), for the purpose of operating and managing theme parks and related recreational facilities.

NOW, THEREFORE, in consideration of the premises, HFEC hereby declares the following:

**ARTICLE I
FORMATION**

HFEC hereby forms a limited liability company pursuant to the Act, to be managed by a manager, who shall be the Board of Managers and Officers, as designated, appointed or elected herein. Unless the Act expressly provides that the Act supersedes any provision contained in this Operating Agreement, the terms and conditions of this Operating Agreement shall apply. HFEC hereby ratifies the Articles of Organization (the "Articles") filed in the Office of the Secretary of State for the State of Missouri on the 17th day of June, 2013 (the "Effective Date"), with respect to the Company, a copy of which is attached hereto as Exhibit A and made a part hereof by this reference. The interest of any member in the Company (HFEC and any substituted or additional members being hereinafter referred to individually sometimes as a "Member" and collectively as the "Members") in the Company shall be personal property for all purposes. All real or personal property owned by the Company shall be owned by the Company as an entity, and no Member individually shall have any ownership interest in that property. All references to the "Code" refer to the internal Revenue Code of 1986, as amended.

**ARTICLE II
NAME**

The name of the Company is Herschend Entertainment Company, LLC. The business and affairs of the Company shall be conducted solely under that name, or under any fictitious names as may be filed by an officer of the Company as approved by the President.

**ARTICLE IV
PRINCIPAL OFFICE**

The principal office of the Company shall be 2800 West Highway 76, Branson, Missouri 65616, or another place or places as may hereafter be approved by the Board of Managers. The initial registered office of the Company, and the initial registered agent at the registered office, shall be set forth in the Articles.

12.4 Counterparts. This Operating Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

12.6 Gender and Number. Whenever the context of this Operating Agreement requires, the masculine gender includes the feminine and neuter genders, and vice versa, and the singular number includes the plural, and vice versa.

12.7 Headings. The headings used in this Operating Agreement are for convenience only and shall not be construed in interpreting this Operating Agreement.

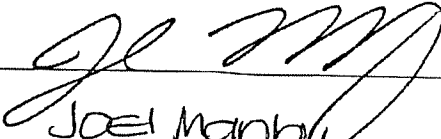
12.8 Entire Agreement. This Operating Agreement contains the entire agreement among the Members with respect to the matters of this Operating Agreement and shall supersede and govern all prior agreements, written or oral.

12.9 Severability. All provisions of this Operating Agreement shall be severable. Any provision that, for any reason, is determined to be invalid shall not affect the validity of any other provision of this Operating Agreement.

12.10 Amendments. This Operating Agreement may not be altered, amended or modified except pursuant to a written instrument executed by all Members.

IN WITNESS WHEREOF, HFEC has executed this Operating Agreement as of the day and year first above written.

HERSCHEND FAMILY ENTERTAINMENT
CORPORATION

By: 

Name: Joel Manby

Title: President

EXHIBIT A

Certificate and Articles of Organization of
Herschend Entertainment Company, LLC



State of Missouri
Jason Kander, Secretary of State

File Number: 201316881131
LC1321636
Date Filed: 06/17/2013
Jason Kander
Secretary of State

Articles of Organization

1. The name of the limited liability company is:

HERSCEND ENTERTAINMENT COMPANY, LLC

2. The purpose(s) for which the limited liability company is organized:

The transaction of any lawful business for which a limited liability company may be organized under the Missouri Limited Liability Company Act, Chapter 347 RSMo.

3. The name and address of the limited liability company's registered agent in Missouri is:

MIKE NICHOLS

Name

901 ST. LOUIS STREET, SUITE 1800, SPRINGFIELD MO 65806

Address

4. The management of the limited liability company is:

☐

Manager

☒

Member

5. The duration (period of existence) for this limited liability company is:

Perpetual

6. The name(s) and street address(es) of each organizer:

STEPHEN L EARNEST, 5445 TRIANGLE PARKWAY, SUITE 200, NORCROSS GA 30092

In Affirmation thereof, the facts stated above are true and correct:

(The undersigned understands that false statements made in this filing are subject to the penalties provided under Section 575.040, RSMo)

STEPHEN L EARNEST

(Organizer Name)

State of Missouri



Jason Kander
Secretary of State

CERTIFICATE OF ORGANIZATION

WHEREAS,

HERSCHEND ENTERTAINMENT COMPANY, LLC
LC1321636

filed its Articles of Organization with this office on the June 17, 2013, and that filing was found to conform to the Missouri Limited Liability Company Act.

NOW, THEREFORE, I, JASON KANDER, Secretary of State of the State of Missouri, do by virtue of the authority vested in me by law, do certify and declare that on the June 17, 2013, the above entity is a Limited Liability Company, organized in this state and entitled to any rights granted to Limited Liability Companies.

IN TESTIMONY WHEREOF, I hereunto set my hand and cause to be affixed the GREAT SEAL of the State of Missouri. Done at the City of Jefferson, this June 17, 2013.

A handwritten signature of Jason Kander in cursive script.

Secretary of State

